Road & Rail Services, Inc. *and* International Brotherhood of Teamsters, Local 326, AFL–CIO, Petitioner and Shopmen's Local Union No. 502 of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL–CIO, Intervenor. Case 4–RC–20881

March 31, 2005

DECISION ON REVIEW AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On November 15, 2004, the Regional Director for Region 4 issued a Decision and Order in which she dismissed the representation petition filed by International Brotherhood of Teamsters, Local 326, AFL–CIO (Petitioner), finding that it was barred by a contract between the Employer and the Intervenor, Shopmen's Local Union No. 502. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Petitioner filed a timely request for review, contending that the existence of three signed contracts between the Employer and the Intervenor raises doubts as to whether there is a single contract which can operate as a bar to the petition. By Order dated December 15, 2004, the Board granted the Petitioner's request for review.

Having carefully considered the entire record, we find, contrary to the Regional Director, that the evidence fails to establish that, as of the date on which the petition was filed, the Employer and the Intervenor had a signed collective-bargaining agreement which operates as a bar to the petition. Consequently, we reverse the Regional Director's dismissal of the petition and remand this case for further proceedings consistent with this decision.

Facts

The Employer is a specialty logistics provider[1] that provides rail car preparation and light maintenance services at the Norfolk Southern Railroad facility in Newark, Delaware. The Petitioner seeks to represent the Employer's maintenance, repair, rail car prepping, and mechanical railcar prepping employees (preppers). The Employer claims that it has a signed contract with the Intervenor covering the prepper employees, which bars the processing of the representation petition.

The Employer is a successor employer to a company which, prior to June 5, 2004,[2] had done the prep work at Newark. The Intervenor had a collective-bargaining agreement with the predecessor company covering the Newark employees. On June 5, the Employer began its operations at Newark and signed a recognition agreement recognizing the Intervenor as the representative of its preppers. The recognition agreement was presented to the Employer by the Intervenor's president and business manager, Donald Wanamaker. Thereafter, the Employer's vice president for human resources, Robert Amrine, and Wanamaker began negotiations for a collective-bargaining agreement.

The undisputed sequence of events pertinent to the issue before us is as follows:

- July 8: Amrine signed a 29-page collective-bargaining agreement in the office of Wanamaker. Amrine left Wanamaker's office and did not see Wanamaker sign the document. Amrine stated that Wanamaker told him he wanted to further review the document. Amrine testified that he actually signed two documents that day.[3] Wanamaker's signature on this agreement is dated July 8. Wanamaker did not testify at the hearing.

- July 16: Amrine signed a second, 27-page collective-bargaining agreement, believing that the July 8 document he previously signed had been lost. Wanamaker did not sign this document. This document contained a retirement plan provision that was not in the July 8 document.

- July 30: The Employer hired an employee who at one time had been employed by the predecessor employer. The Employer did not give this employee a copy of a collective-bargaining agreement (which contained a "just cause" termination provision). Instead, the employee was given an employee handbook (which specified that employment was "at will").

- August 10: The Petitioner requested recognition from the Employer. The Employer did not respond to the request.

- August 11: The Petitioner filed its petition seeking an election in a unit of the Employer's preppers. On that same date, Wanamaker met with all five preppers and asked them if they had signed authorization cards for the Petitioner. They indicated they had done so. Wanamaker then asked the employ-

[1] The Employer's work involves, inter alia, loading and unloading vehicles onto rail cars, repairing rail cars, and providing consulting to railroads.

[2] All subsequent dates are in 2004 unless indicated otherwise.

[3] Amrine testified, referring to the July 8 document, that he signed "this thing probably two or three times because there was corrections that were made to it."

ees if they would sign authorization cards for the Intervenor, but the employees refused. Wanamaker gave the employees the contract dated July 16 that only the Employer had signed.

- August 16: The Petitioner's president asked Wanamaker if the Intervenor had a contract with the Employer. Wanamaker denied that the Intervenor had a contract. Within an hour of his denial, however, Wanamaker told the Petitioner that the Intervenor did in fact have a contract with the Employer, but that its International had conducted the negotiations.

A portion of an additional contract was introduced into evidence at the hearing. This contract was signed by the Employer on July 8, and was signed by the Intervenor on August 16.

In sum, three documents were introduced into evidence at the hearing: (1) a contract signed by the Employer and the Intervenor on July 8; (2) a contract signed by the Employer on July 8 and by the Intervenor on August 16; and (3) a contract signed by the Employer on July 16, but not signed by the Intervenor.

The Regional Director found that the Employer and the Intervenor had met their burden of proving that the July 8 contract is a bar to the petition, noting that the document contained substantial terms and conditions of employment and—on its face—was signed and dated by representatives of both the Employer and Intervenor. The Regional Director rejected the Petitioner's claim that the existence of three different signed agreements is "suspicious," and that the Employer's and Intervenor's contract bar argument "is a collateral fraud." First, the Regional Director refused to draw an adverse inference from Wanamaker's failure to testify. Although acknowledging that it would have been "far preferable" had Wanamaker testified as to the date on which he allegedly signed an agreement, the Regional Director found that there was an "insufficient basis" to show that the Employer and the Intervenor did not sign the contract on July 8, "when the agreement on its face clearly indicates that the parties signed it on that date." Next, regarding the additional signed agreements, the Regional Director found that their "mere presence" did not cast serious doubt as to the date on which the initial agreement was signed, finding that Amrine "reasonably" explained that he signed a second agreement on July 16 because he believed that the July 8 document had been lost, but observing that there is no explanation for the August 16 document. Finally, while noting that the Employer's distribution of the employee handbook to an employee on July 30, containing a termination provision contrary to the negotiated contract terms, and Wanamaker's initial claim on Augusts 16 that the parties did not have a contract, presented unusual circumstances, the Regional Director concluded that the July 8 document satisfied the Board's longstanding contract-bar principles stated in *Appalachian Shale Products Co*., 121 NLRB 1160, 1161 (1958), and that it is a bar to the representation petition, which she dismissed. For the following reasons, we disagree.

Analysis

The Board has long held that, for contract-bar purposes, an agreement must meet certain formal and substantive requirements, including the requirement that the document proposed as a bar be signed by both parties prior to the filing of the petition that it would bar. *Appalachian Shale*, supra at 1161. The Board has also long held that the party asserting that a contract operates as a bar bears the burden of proving that the contract was signed by both parties before a petition was filed. *Roosevelt Memorial Park, Inc*., 187 NLRB 517 (1970). See also *Bo-Low Lamp Corp.*, 111 NLRB 505 (1955), and *Appalachian Shale*, supra at 1160.

In *Bo-Low Lamp Corp.*, the parties to a contract presented inconsistent testimony as to the date on which they each signed the contract. The Board stated:

> A contract duly executed, signed and dated received in evidence would, if unchallenged, make a prima facie case as to the date of its execution and signing. However, if evidence of sufficient probity and weight is introduced overcoming the prima facie case established by the contract itself, then the party or parties, claiming the contract is a bar, must meet and overcome such evidence. [Id. at 508.]

The Board in *Bo-Low* concluded that the party asserting contract bar did not sustain its burden of proving that the contract was signed before the petition was filed.

The Board reached a similar result in *Roosevelt Memoria Park*, supra. The contract in evidence, although signed, was undated, and the testimony to support the intervenor's contention that the contract was executed before the representation petition was filed was, according to the Board, "vague, ambiguous, and inconsistent." *Roosevelt Memorial Park*, supra at 518. In those circumstances, the Board concluded that the contract was not a bar to an election.

Similar confusion exists in the present case as to the date on which a contract worthy of bar purposes was signed. The Employer asserts that a document allegedly signed by the Employer and Intervenor, dated July 8, is sufficient to bar the petition. No witness testified, however, to having seen the Intervenor's representative, Wanamaker, sign this July 8 document. Rather, the Employer's vice president, who did sign the contract on July 8, testified that Wanamaker indicated that he needed to "conduct further reviews" of the document. Moreover,

Wanamaker did not testify at the hearing, and thus did not verify that he signed the contract on July 8.

Significantly, there are at least two more documents that were signed before the petition was filed: (1) a contract dated July 16 that the Intervenor gave to employees, but which only the Employer had signed; and (2) a contract signed on July 8 by the Employer and on August 16 by the Intervenor. As to the latter contract, it is significant that August 16 was the same date on which the Intervenor first told the Petitioner that it (the Intervenor) did *not* have a contract, but then quickly contradicted that answer, stating that there was a contract that the *International* (rather than Wanamaker) had negotiated for the Intervenor.[4]

Contrary to the Regional Director, we find that the Petitioner has raised sufficient uncertainty as to the date on which a contract worthy of bar purposes was signed. The Regional Director found that the evidence here "did not establish that Wanamaker did not sign" the July 8 document. Given the circumstances of this case, we find that the Regional Director has misallocated the burden of proof. No witness testified that Wanamaker signed the July 8 contract on that date, or any other date preceding the filing of the petition. Amrine signed three contracts, one with a retirement provision not included in the other. Wanamaker gave employees a contract that did not have his signature and contained a different date from that on the contract found by the Regional Director to be a bar. Finally, one contact the Intervenor signed was dated August 16, the same date on which the Petitioner inquired of the Intervenor whether there was a signed agreement, and on which the Intervenor first responded that there was not a signed contract. In these circumstances, we conclude that neither of the parties asserting contract bar has met its burden of presenting evidence sufficient to overcome and resolve the myriad uncertainties in this case. *Bo-Low Lamp Corp.*, supra at 508. Accordingly, we find that there is no bar to the instant petition.

[4] Notably, the July 8 document and the July 16 document are different—the July 16 document includes a retirement provision not included in the July 8 document. Further, the full contents of the document signed on July 8 and August 16 are not in the record.

ORDER

The Regional Director's Decision is reversed, the petition is reinstated, and the case is remanded to the Regional Director for further appropriate action.

Dated, Washington, D.C. March 31, 2005

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Peter C. Schaumber,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD